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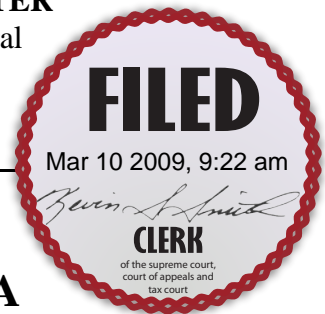
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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY A. FOSTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 14A05-0809-CR-525

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobecki, Judge
Cause No. 14D01-0605-FD-395

March 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jeffrey A. Foster appeals his conviction for class A misdemeanor marijuana possession and a habitual substance offender sentence enhancement. We affirm.

Issues

We restate the issues as follows:

- I. Did the trial court abuse its discretion in admitting certain evidence?
- II. Did the trial court abuse its discretion in sentencing Foster?

Facts and Procedural History

On April 27, 2006, during a routine traffic stop, Washington Police Department Officers Jeffrey Boes and Barry Hudson discovered outstanding warrants for both the driver of the vehicle, Justin Raymann, and his passenger, Foster. Both were placed under arrest. Pursuant to the arrest, the officers searched Raymann's vehicle and discovered a firearm, ammunition, a plastic bag containing ninety-five grams of marijuana under the driver's seat, and a brown bag containing 113 grams of marijuana on the back seat floor. When Foster was processed into jail on the unrelated charge, he removed the jacket he was wearing and said that it was Raymann's. The jacket pockets contained cigarettes, a lighter, a bag containing four grams of marijuana, rolling papers, and a scale.

On May 3, 2006, the State charged Foster with one count of class D felony possession of more than thirty grams but less than ten pounds of marijuana and one count of class A misdemeanor possession of less than thirty grams of marijuana. The State also filed a habitual substance offender count. On July 21, 2008, the State dismissed the class D felony

count and the habitual offender count. On July 22, 2008, the State filed an amended habitual substance offender information.

On July 23, 2008, a jury convicted Foster of class A misdemeanor marijuana possession. Foster admitted to being a habitual substance offender, based on three prior operating while intoxicated (“OWI”) convictions. On July 25, 2008, the trial court sentenced Foster to one year for marijuana possession, with a four-year habitual substance offender enhancement. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Admissibility of Evidence

Foster contends that the trial court erred in admitting certain evidence at trial. His admissibility challenge involves two separate bases: hearsay and relevancy. At the outset, we note that in both instances, he failed to enter a contemporaneous objection. As such, he has waived the admissibility issue on appeal. *Book v. State*, 880 N.E.2d 1240, 1248 (Ind. Ct. App. 2008), *trans. denied*. In an attempt to avoid waiver, Foster argues that fundamental error occurred. The fundamental error exception is extremely narrow and therefore is “available only where the record reveals clearly blatant violations of basic and elementary principles of due process and the harm or potential for harm cannot be denied.” *Id.* “To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Sandifur v. State*, 815 N.E.2d 1042, 1046 (Ind. Ct. App. 2004), *trans. denied*.

First, Foster challenges on hearsay grounds the admission of a statement Raymann

made to police that Foster had shown *him* the brown bag containing 113 grams of marijuana before the arrest. The State concedes that the statement is hearsay under Indiana Evidence Rule 801(c), but counters that its admission did not rise to the level of fundamental error. We agree. Substantial independent evidence shows that, shortly after his arrest, when he was processed into jail, Foster had four grams of marijuana in his possession. He was convicted of misdemeanor marijuana possession and not felony possession, which would have required the possession of a quantity greater than the amount found in the jacket pocket. Ind. Code § 35-48-4-11.

Foster argues that he lacked knowledge of the marijuana in the jacket pocket because Raymann was the owner of the jacket. We find it telling, however, that Foster attempted to disown the jacket *before* its pockets were searched. The jailer who booked Foster testified that immediately upon arrival, Foster made an unsolicited statement that the jacket was not his. Tr. at 96-97. When the jailer instructed him to empty his pockets, Foster emptied his pants pockets but not his jacket pockets. *Id.* at 97. Instead, he threw the jacket on the counter and repeatedly stated that the jacket was not his. *Id.* Foster's pre-emptive protest strongly suggests that he was aware of the jacket's illegal contents. Thus, substantial independent evidence existed to indicate that Foster knowingly possessed four grams of marijuana. *See Edwards v. State*, 862 N.E.2d 1254, 1259 (Ind. Ct. App. 2007) (stating that improper admission of evidence is harmless error if conviction is supported by substantial independent evidence of guilt satisfying reviewing court that there is no substantial likelihood the challenged evidence contributed to conviction), *trans. denied*. Therefore, he

was not prejudiced by the improper admission of Raymann's hearsay statement that Foster showed him the brown bag of marijuana.

Foster also alleges that the trial court committed fundamental error in admitting irrelevant evidence of the brown bag and firearm seized from the vehicle. Indiana Evidence Rule 402 provides that "[e]vidence that is not relevant is inadmissible." Indiana Evidence Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

First, we address the relevance of the brown bag of marijuana found on the floor of the vehicle. The State initially charged Foster with two separate counts of marijuana possession—one felony count, for possessing an amount exceeding thirty grams, and one misdemeanor count, for possessing an amount less than thirty grams. Although the charging informations did not specify that the felony count corresponded to the 113 grams of marijuana contained in the brown bag and the misdemeanor count corresponded to the four grams of marijuana found in the jacket pocket, the State dismissed the felony count and then focused its opening and closing arguments on the marijuana contained in the jacket pocket. Raymann admitted that the brown bag of marijuana belonged to him. Thus, its mere presence in the vehicle occupied by Foster and Raymann does not tend to make it more probable that Foster knowingly possessed the marijuana found in the jacket pocket. Therefore, the trial court improperly admitted it.

Next, we address the relevance of evidence regarding the firearm. At the outset, we

note that Foster was never charged with any crime related to the firearm. Moreover, Raymann admitted that the firearm belonged to him. To the extent the State asserts that its motivation in introducing the firearm was “simple thoroughness” and an attempt to strategically head off its introduction by Foster in his case-in-chief, we are unconvinced that Foster would have any reason to broach the subject. Appellee’s Br. at 10. Thus, the evidence is irrelevant and therefore inadmissible pursuant to Indiana Evidence Rule 402.

In sum, both the brown bag of marijuana and the firearm were irrelevant, inadmissible evidence used by the State to portray Foster as a bad character. However, Foster has failed to establish fundamental error. As discussed, substantial independent evidence existed to establish that Foster knowingly possessed the marijuana found in the jacket pocket. Moreover, a property inventory sheet was introduced and admitted at trial without objection. State’s Ex. 13. The inventory sheet listed the firearm and the brown bag among the items found in the vehicle. Therefore, the erroneously admitted evidence was merely cumulative of other evidence admitted without objection. As such, it was harmless error. *VanPelt v. State*, 760 N.E.2d 218, 224 (Ind. Ct. App. 2001), *trans. denied* (2002). Accordingly, we affirm Foster’s conviction.

II. Sentencing

Finally, Foster contends that the trial court abused its discretion by relying on facts not in evidence to enhance his sentence. Sentencing decisions rest within the trial court’s sound discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. As long as the sentence is within the statutory range, we review it only for an

abuse of discretion. *Id.* An abuse of discretion occurs if the sentencing decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* (citation omitted). A sentencing court abuses its discretion if its stated reasons for imposing the sentence are not supported by the record. *Id.* “Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Anglemeyer*, 868 N.E.2d at 491.

Here, Foster was sentenced in a joint proceeding that included a hearing on petitions to revoke his suspended sentence and home detention in another case. Although a presentence investigation report existed in Foster’s other case, it was not incorporated into the record in the instant case.¹ We agree with Foster that the State’s references to certain items in the presentence investigation report did not constitute evidence and therefore could not serve as the basis for his sentence. *See Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999) (stating that arguments of attorneys do not constitute evidence). However, the presentence investigation report did not serve as the basis for the trial court’s sentencing decision.

Instead, facts in evidence supported the trial court’s imposition of a one-year executed sentence for class A misdemeanor marijuana possession, *see* Ind. Code § 35-50-3-2, with a

¹ A presentence investigation report is not required in misdemeanor sentencing proceedings. *See* Ind. Code § 35-38-1-8.

four-year habitual substance offender enhancement. *See* Ind. Code § 35-50-2-10(f).² The facts in evidence regarding Foster’s criminal history include his admission to three prior OWI convictions and his subsequent admission to his habitual substance offender status. *Id.* at 239-40, 243. Although Foster initially seemed confused regarding the inclusion of his one misdemeanor and two felony OWI offenses as “substance” offenses, the trial court was careful to include in the record Foster’s admission to each individual OWI offense and to point out that his conviction for misdemeanor marijuana possession did not depend upon whether he was operating a vehicle at the time. Tr. at 239-42, 256. Because the record supports Foster’s sentence, we are confident that the trial court would have imposed the same sentence even absent the State’s references to the presentence investigation report. Accordingly, we affirm Foster’s sentence.

Affirmed.

ROBB, J., and BROWN, J., concur.

² Indiana Code Section 35-50-2-10(f) provides in part: “The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3.”